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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOEL I. SHER in his capacity as Chapter 11 Trustee for TMST, INC., f/k/a THORNBURG MORTGAGE, INC., *et al.*, Plaintiff, v. JPMORGAN CHASE FUNDING INC., *et al*., Defendants.	Adv. Proc. No. 11-0340-NVA United States Bankruptcy Court for the District of Maryland
JPMORGAN CHASE FUNDING INC. (AS SUCCESSOR TO BEAR STEARNS INVESTMENT PRODUCTS INC.), CITIGROUP GLOBAL MARKETS LIMITED, CITIGROUP GLOBAL MARKETS, INC., CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE INTERNATIONAL, AND UBS AG (AS SUCCESSOR TO UBS SECURITIES LLC), Movants, v. LEGACY DCP, LLC (f/k/a DYNAMIC CREDIT PARTNERS, LLC) Opponent.	Case No. ______ MISC. ________

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY NON-PARTY LEGACY DCP, LLC (f/k/a DYNAMIC CREDIT PARTNERS, LLC)

Pursuant to Rules 45 and 37(a) of the Federal Rules of Civil Procedure, as made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7037 and 9016, Defendants[1] in the above-captioned adversary proceeding (the "Action") pending in the United

[1] The Defendants to the Action joining this motion are JPMorgan Chase Funding Inc. (as successor to Bear Stearns Investment Products Inc.) ("JPM"), Citigroup Global Markets, Inc. ("CGMI"), Citigroup Global Markets Limited ("CGML," and, together with CGMI, "Citi"), Credit Suisse Securities (USA) LLC ("CSSU"), Credit Suisse International ("CSI"), and UBS AG (as successor to UBS Securities LLC)

States Bankruptcy Court for the District of Maryland respectfully submit this memorandum of law in support of their motion to compel (the "Motion") production of documents by Legacy DCP, LLC (f/k/a Dynamic Credit Partners, LLC) ("Dynamic Credit") in compliance with Defendants' Subpoena *duces tecum* and Requests for Production of Documents, dated November 4, 2016 (the "Subpoena") (attached hereto as Exhibit 1).

Defendants seek a determination by this Court that Dynamic Credit cannot withhold documents on the basis of any attorney-client privilege, common interest privilege, or work product privilege with respect to any communications involving MatlinPatterson Global Advisers LLC ("MatlinPatterson") and its attorneys. This includes 53 document families, totaling 119 total documents, withheld by Dynamic Credit at the direction of MatlinPatterson and listed on a privilege log provided to Defendants by MatlinPatterson.

PRELIMINARY STATEMENT

MatlinPatterson is a New York-based distressed investment and securities fund that played a key role in events at the core of the complaint (the "Complaint") in the Action (attached hereto as Exhibit 2) filed by Joel Sher, the Chapter 11 Trustee (the "Trustee") of the bankruptcy estates of Thornburg Mortgage, Inc., and its affiliates ("Thornburg" or the "Debtors"). In March 2008, persuaded that Thornburg represented an attractive investment opportunity, MatlinPatterson injected approximately $500 million into Thornburg in connection with one of the agreements upon which the Trustee's claims in the Action against Defendants are based. MatlinPatterson's lead investment enabled Thornburg to consummate the transactions at the heart of the Complaint.

("UBS") (collectively, "Defendants"). RBS Securities Inc. (f/k/a Greenwich Capital Markets Inc.) ("RBS Securities"), Greenwich Capital Derivatives Inc. ("Greenwich"), and The Royal Bank of Scotland PLC ("RBS PLC") are also defendants in the Action but do not join this motion.

Given MatlinPatterson's significant investment in Thornburg, Defendants sought to compel MatlinPatterson to produce its valuation-related documents. The court presiding over the Action in Maryland found such documents relevant and compelled MatlinPatterson to produce its communications with third-party advisors providing valuation services.

But while waiting for MatlinPatterson to produce such documents, Defendants discovered—through a review of documents produced by Thornburg's bankruptcy trustee—that Dynamic Credit provided valuation advisory services regarding Thornburg's residential mortgage-backed securities ("RMBS") to MatlinPatterson *and also to Thornburg itself*, all during the same time periods in 2008. And although an engagement letter (albeit an unsigned copy) has been produced defining the scope of Dynamic Credit's engagement with Thornburg, no engagement letter ever existed between Dynamic Credit and MatlinPatterson.

Despite the fact that Dynamic Credit was providing financial analysis regarding the value of Thornburg, its assets, and in particular the RMBS—services that are distinctly non-legal in nature—MatlinPatterson seeks to shield from production 53 families of documents (119 total documents) shared with Dynamic Credit employees based on dubious assertions of attorney-client privilege and a common interest privilege. *See* Privilege Log of Non-Party MatlinPatterson, dated March 6, 2017 (attached hereto as Exhibit 3) (the "Log"). In addition, MatlinPatterson has asserted a work product privilege over 17 of these same document families. By including non-lawyer third parties who are not necessary to the attorneys' provision of legal advice and who share no common legal interest with regard to communications with MatlinPatterson's counsel, MatlinPatterson's communications are not privileged. As such, Defendants are entitled to this indisputably relevant discovery from Dynamic Credit.

BACKGROUND AND PROCEDURAL HISTORY

I. Dynamic Credit's Involvement in the Events Underlying the Complaint.

1. The Action arises from the fallout of the unprecedented collapse of the U.S. housing market in 2007 and 2008. At the time, Thornburg was a significant and sophisticated real estate investment trust with interests in billions of dollars of RMBS. Thornburg was also one of the largest originators of jumbo mortgages in the country. To finance its RMBS investment and origination activities, Thornburg entered into various agreements with Defendants, among others, that provided Thornburg with billions of dollars of funds with which to finance its business operations. These agreements included ISDA master agreements, master repurchase agreements, global master repurchase agreements, auction swaps, and interest rate caps, including the corresponding confirmations entered into thereunder (each a "Financing Agreement" and, collectively, the "Financing Agreements").

2. Like nearly all of its competitors and the banks that financed them, Thornburg faced financial challenges and distress resulting from the sudden housing market collapse in 2007. By Thornburg's own admission, the value of the company's RMBS "decreased significantly." *See* Mar. 3, 2008 Thornburg Current Report (8-K) (attached hereto as Exhibit 4) at 1. Pursuant to the terms of their Financing Agreements, Thornburg's counterparties, including Defendants, demanded that Thornburg provide them with additional securities or cash payments in order to adequately protect their interests. Thornburg, however, was unable to meet "the substantial majority of the[se] . . . margin calls," and many of Thornburg's counterparties declared events of default. *Id.*; *see also* Compl. ¶¶ 50, 54.

3. Unlike some housing market participants who immediately failed, Thornburg was provided substantial breathing room to reorganize and survive the downturn when Defendants

agreed to forbear from immediately exercising their rights and remedies against Thornburg. This forbearance was memorialized in the "Override Agreement," dated March 17, 2008.

4. Among other things, under the Override Agreement, Defendants forbore from exercising their respective rights under the Financing Agreements to immediately liquidate their positions with Thornburg for a period of one year, thereby allowing Thornburg to pursue restructuring possibilities. In exchange, Thornburg agreed to, among other things, raise over $1 billion in new capital, $350 million of which would be used to establish a "liquidity fund" from which the company could draw to meet certain obligations under the Financing Agreements. *See* Override Agreement (attached hereto as Exhibit 5), §§ 3(a) & 3(c).

5. The Override Agreement thus sent a signal to the market that Thornburg had the ability to weather what then was widely considered a temporary market dislocation, in part, through raising significant capital to "right-size" its balance sheet. As Thornburg's CEO proclaimed, "[T]he override agreement and the completion of our proposed offering should allow us to return our focus to our core business operations—the origination and securitization of adjustable-rate mortgage loans with superior credit performance."[2]

6. In connection with the capital raise associated with the Override Agreement, Thornburg engaged Dynamic Credit to "perform analysis of the mortgage securities portfolio . . . and provide advisory and marketing support . . . related to Thornburg's capital raising through the issuance of Senior Subordinated Secured Notes and a Prepaid Cash Settlement Agreement." DC0003656-58, March 26, 2008 Engagement Letter (attached hereto as Exhibit 6).

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[2] Press Release, Thornburg Mortgage Announces One-Year Reverse Repurchase Override Agreement and Proposed $1 Billion Public Offering of Convertible Notes (Mar. 19, 2008), *available at* http://www.businesswire.com/news/home/20080319005677/en/Thornburg-Mortgage-Announces-One-Year-Reverse-Repurchase-Override ("Thornburg Press Release") (attached hereto as Exhibit 7).

7. On March 31, 2008, Thornburg announced that it had met the Override Agreement's capital raise requirement through the issuance of certain Senior Subordinated Notes (the "SSN"). *See* Compl. ¶ 80. [redacted]

8. In connection with its investment in Thornburg, MatlinPatterson also engaged Dynamic Credit—separate and apart from Thornburg's engagement of Dynamic Credit during this same time period—to provide financial analyses and valuations of Thornburg and its RMBS. Further, given MatlinPatterson's continued and substantial interest in Thornburg, MatlinPatterson subsequently asked Dynamic Credit to perform additional financial analysis and valuations in September 2008 when Thornburg's RMBS yet again experienced a "significant decrease" in value due to market downturn.

II. The Present Discovery Dispute.

9. On November 4, 2016, in connection with this Action, Defendants issued the Subpoena to Dynamic Credit, requesting, among other things, documents regarding: Thornburg's or MatlinPatterson's engagement of Dynamic Credit; the "price, value, or rating of the [RMBS]"; and Thornburg's "actual or projected financial condition, liquidity, capitalization, and solvency." *See* Exhibit 1, Subpoena, at 11-12.

10. In accordance with the Subpoena, Dynamic Credit's compliance was required by November 23, 2016. On November 18, 2016, Dynamic Credit objected to the Subpoena in the form of a draft, undated objection. *See* Dynamic Credit Objection (attached hereto as Exhibit 8). In its Objection, Dynamic Credit agreed to produce non-privileged documents responsive to clarified requests for production. No party has ever filed a motion to quash the Subpoena or sought entry of a protective order.

11. On December 2, 2016, Dynamic Credit and Defendants met and conferred regarding the Subpoena and reached an agreement regarding the general categories of documents that would be produced, including any engagement letters, documents regarding the valuation of the RMBS, and any communications among Dynamic Credit, on the one hand, and MatlinPatterson or Thornburg, on the other hand.

12. Also on December 2, 2016, the court in the Action issued an order on motions to compel MatlinPatterson and the Trustee. *See Joel I. Sher v. JPMorgan Chase Funding, Inc., et al.*, Adv. No. 11-00340-NVA (Bankr. D. Md.) (Dkt. No. 281) (attached hereto as Exhibit 9). When considering Defendants' request for communications between MatlinPatterson and its third-party advisors or accountants, the court reasoned that "Defendants argued at the hearing (and the Court agrees) that, as prudent investors, MatlinPatterson would almost certainly have done an assessment of the value of the Debtor(s)." *Id.* at 9. In light of the allegations in the Complaint, the court determined these valuation documents to be relevant and compelled MatlinPatterson to produce any documents and communications regarding financial assessments and valuations of Thornburg and its assets that it had not already produced. *See id.*

13. In early January 2017, upon learning of Dynamic Credit's intention to comply with the Subpoena by producing documents, both MatlinPatterson and the Trustee requested the opportunity to review Dynamic Credit's proposed production before Dynamic Credit made its production to Defendants.

14. As an accommodation to MatlinPatterson and the Trustee, and to expedite what has already been a lengthy and contentious discovery period, Defendants agreed to allow MatlinPatterson and the Trustee to review Dynamic Credit's documents for privilege purposes only, and to prepare a privilege log that comported with applicable District of Maryland local

bankruptcy rules. Defendants expressly reserved all their rights with respect to this review process.

15. Accordingly, both MatlinPatterson and the Trustee reviewed Dynamic Credit's production. The Trustee has not claimed a privilege over any documents, yet MatlinPatterson has claimed either attorney-client privilege, common interest privilege, or work product privilege over 53 document families (totaling 119 documents), which were cataloged on the Log.

16. On March 14, 2017, in response to Defendants' request that Dynamic Credit identify any executed engagement letters between Dynamic Credit and either MatlinPatterson or Thornburg, counsel for Dynamic Credit wrote to Defendants confirming that Dynamic Credit's work for MatlinPatterson was done by oral agreement.

17. On March 21, 2017, counsel for Dynamic Credit wrote to Defendants indicating it had no "desire to be any longer involved" and would send an invoice for its out-of-pocket costs.

18. In an effort to meet and confer, counsel for Citi emailed counsel for Dynamic Credit and counsel for MatlinPatterson on March 31, 2017, stating Defendants' objection to the privileges asserted on the Log. Dynamic Credit did not respond. However, counsel for MatlinPatterson responded on April 5, 2017, stating that it stands by its asserted privileges.

ARGUMENT

I. Communications Between MatlinPatterson and Its Counsel Disclosed to Dynamic Credit Are Not Protected by Privilege.

19. Parties may obtain discovery regarding any "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1); Fed. R. Bankr. P. 7026. This broad mandate encompasses any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

20. When third parties, such as financial professionals, are included on an attorney-client communication, privilege is only extended to communications with those third parties if the proponent of the privilege can demonstrate the third party either: (1) can be considered the "functional equivalent" of the client, *see Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103 (S.D.N.Y. 2005); or (2) is necessary to facilitate communication between the client and the attorney, *see Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 430-31 (S.D.N.Y. 2013); *Prowess, Inc. v. Raysearch Labs. AB*, No. CIV. WDQ-11-1357, 2013 WL 509021, at *3 (D. Md. Feb. 11, 2013).

21. The functional equivalent doctrine is very difficult to satisfy and typically does not extend to communications with financial advisors, even when the financial advisor spent a large proportion of its time working on the client's business. *See Export-Import Bank of the U.S.*, 232 F.R.D. at 113-14. Indeed, the third party must be "so fully integrated into [the Company's] hierarchy as to be a de facto employee." *Id.*; *see also Church & Dwight Co., Inc. v. SPD Swiss Precision Diagnostics, GmbH*, No. 14-cv-585, 2014 WL 7238354, at *3 (S.D.N.Y. Dec. 19, 2014) (refusing to apply functional equivalent doctrine and reasoning that to apply it would "swallow the privilege rule and would extend the attorney-client privilege to communications with any third party who was hired to assist the client with something the client could not do on its own").

22. It is likewise difficult for the proponent of a privilege claim to demonstrate that a third party is *necessary* to assist an attorney with her provision of legal advice, as required by the Second Circuit in *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961). *See, e.g., Ceglia v. Zuckerberg*, No. 10-CV-00569, 2012 WL 3527935, at *2 (W.D.N.Y. Aug. 15, 2012) (*Kovel* doctrine did not apply when consultant did not act as translator or interpreter of communications between client

and attorney); *Ravenell v. Avis Budget Grp., Inc.*, No. 08-CV-2113 (SLT), 2012 WL 1150450, at *3 (E.D.N.Y. Apr. 5, 2012) (*Kovel* doctrine did not apply when third-party consultant was hired to make initial classifications that attorneys could have made themselves). Indeed, the involvement of the third party "[must] be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications" or else the privilege is waived. *Ross v. UKI Ltd.*, No. 02 Civ. 9297 WHPJCF, 2003 WL 22319573, at *1-2 (S.D.N.Y. Oct. 9, 2003).[3]

23. Here, not one of MatlinPatterson's 53 Log Entries provides any indication that Dynamic Credit's presence was "nearly indispensable" to the attorney's facilitation of legal advice. Instead, the subject matter descriptions of the communications that include Dynamic Credit provide no insight as to Dynamic Credit's role or the reason its employees were included on such communications. *See, e.g.,* [redacted]

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[3] Like New York courts, Maryland courts have adopted the *Kovel* standard, reasoning that attorney-client privilege may only be extended to attorney-client communications that include third parties, like financial professionals, "if the third party is needed to facilitate communication between the client and the attorney"; otherwise the communication either was not privileged or the privilege was waived. *Prowess*, 2013 WL 509021, at *3 (citations and internal quotations omitted); *see also Flo Pac, LLC v. NuTech, LLC*, No. WDQ-09-510, 2010 WL 5125447, at *8-10 (D. Md. Dec. 9, 2010) (the third-party presence must be "nearly indispensable" in facilitating attorney-client communications, not just convenient) (quoting *U.S. v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999)); *RCC, Inc. v. Cecchi*, No. 323447, 2010 WL 5180341 (Md. Cir. Ct. Nov. 1, 2010) (applying *Kovel* analysis and finding communications with accountants were not privileged). Indeed, as the Trustee in this very bankruptcy case learned in similar litigation, no privilege can be claimed over communications that include financial advisors that are not "necessary" or "nearly indispensable" to the provision of legal advice. *See Sher v. SAF Fin., Inc.*, No. CIV. RDB 10-1895, 2011 WL 1484246, at *3 (D. Md. Apr. 19, 2011) (holding that the Trustee could not claim the attorney-client privilege with respect to communications with Protiviti, the financial advisor retained by the Debtors) (citing *Green v. Beer*, No. 06-Civ-4156, 2010 WL 2653650 (S.D.N.Y. July 2, 2010)). Further, the court in *Sher* rejected the Trustee's argument that its financial advisor was a *de facto* employee of the Debtors in light of the fact that the financial advisor was not hired by the Debtors' attorneys or any other law firm and "did not provide assistance that amounted to translating services, but instead acted as an ordinary financial advisor." *Id.*

24. In fact, [redacted]—which is far from supportive of any assertion that Dynamic Credit was purportedly "necessary" to the attorneys' provision of legal advice or was acting as a "translator" for the attorneys, as required by *Kovel*.

25. Further, the proponent of a privilege claim on communications including third parties must provide factual support for any claim that the third party was nearly indispensable to the attorneys' provision of legal advice or was acting as a *de facto* employee of the client. To this end, while engagement letters are not a pre-requisite to a claim of privilege, because determining a third party's role can be a fact intensive inquiry, an engagement letter can evidence how the parties viewed their relationship and their expectation of confidentiality. *See, e.g.*, *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 107-08 (S.D.N.Y. 2007) (considering engagement letter when analyzing the relationship between the company and a non-attorney and assessing privilege claims over communications between them); *U.S. Home Corp. v. Settlers Crossing, LLC*, No. CIV. A. DKC 08-1863, 2014 WL 1275995, at *3 (D. Md. Mar. 26, 2014) (analyzing draft agreement to determine the scope of a third party's role and finding that communications with the third party were not privileged and documents were improperly withheld).

26. In this case, Dynamic Credit has confirmed that it had no engagement letter with MatlinPatterson for the valuation work it provided. Thus, Defendants are forced to rely on the

vague descriptions in the Log and whatever can be gleaned from Dynamic Credit's produced documents to determine the nature of MatlinPatterson's privilege claims.

27. MatlinPatterson has not made—and cannot make—the required showing that Dynamic Credit was necessary for the provision of legal advice. During the relevant time period, Dynamic Credit's role was providing valuation and advisory services for loan portfolios and bonds.[4] It is evident from produced documents that MatlinPatterson hired Dynamic Credit to provide its valuation services in connection with MatlinPatterson's investment in Thornburg. *See, e.g.*, DC0000402 (attached hereto as Exhibit 10) [redacted]; DC0004731-32 (attached hereto as Exhibit 11) [redacted]

28. Neither the descriptions on the Log nor a common sense interpretation of the produced communications between Dynamic Credit and MatlinPatterson indicate anything other than a relationship between a company and an "ordinary financial advisor" engaged to provide valuation services. *Sher*, 2011 WL 1484246, at *3. This is not a *de facto* employee relationship, and Dynamic Credit was not necessary to MatlinPatterson's counsel's provision of legal advice. Accordingly, no basis exists for Dynamic Credit to withhold documents from Defendants pursuant to MatlinPatterson's attorney-client privilege claims.

29. With respect to MatlinPatterson's work product claims, the work product protection is intended to provide a lawyer with a "zone of privacy" to accomplish his work, "free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Critically, work product protection attaches to a document only if it was

[4] Dynamic Credit is currently in dissolution.

prepared in anticipation of litigation. *See In re Grand Jury Proceeding*, 79 F. App'x 476, 477 (2d Cir. 2003). Neither the timing nor the descriptions of the withheld documents suggests they were created "*because* of the prospect of litigation," as is required to invoke the doctrine, rather than primarily in support of MatlinPatterson's assessment of a potential investment. *Id.* (internal quotation marks omitted) (emphasis in original).

30. In any event, work product protection may be waived by voluntary disclosure to a non-client third party, *see Ricoh Co., Ltd. v. Aeroflex, Inc.*, 219 F.R.D. 66, 70-71 (S.D.N.Y. 2003) (holding defendants waived work product protection over emails that defense counsel sent to independent third-party witness with whom defendants did not share common interest); *Medinol, Ltd. v. Boston Sci. Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002) (holding work product protection waived for disclosures to independent auditor who did not share common interests with corporation); *Verschoth v. Time Warner, Inc.*, No. 00 Civ. 1193(AGS), 2001 WL 546630, at *4 (S.D.N.Y. May 22, 2001) (holding work product protection waived where company shared litigation strategy against plaintiff with non-party independent contractor). Specifically, "where the third party to whom the disclosure is made is not allied in interest with the disclosing party or does not have litigation objectives in common, the protection of the doctrine will be waived." *Medinol*, 214 F.R.D. at 115 (citing *Verschoth*, 2001 WL 546630, at *4).

31. The disclosure of MatlinPatterson's counsel's work product to Dynamic Credit constitutes a waiver of the work product protection. MatlinPatterson's disclosure to Dynamic Credit of documents reflecting legal analysis regarding draft term sheets and the Override Agreement (*see, e.g.*, Log Entry Nos. 1, 9, 10-18, 22) not only substantially increased the risk

that such work product would reach potential adversaries, but also failed to serve any litigation interest. *See Medinol*, 214 F.R.D. at 116.

32. Indeed, the risk of disclosure to potential adversaries in this particular situation was heightened because in March 2008, Dynamic Credit was providing valuation analysis of Thornburg's RMBS to both Thornburg and MatlinPatterson. Prior to MatlinPatterson's investment in Thornburg on March 30, 2008, Thornburg and MatlinPatterson were adverse parties negotiating a potential half-billion dollar investment. Thus, MatlinPatterson's disclosure of attorney work product to Dynamic Credit during this time period certainly resulted in a waiver. *See* Log Entry Nos. 22, 23, 24, 46, 47.

33. Presuming any work product protection ever attached to these communications, as a result of MatlinPatterson's waiver, Dynamic Credit should not be permitted to withhold documents from Defendants pursuant to MatlinPatterson's work product privilege claims.

II. No Communications That Include Dynamic Credit Are Shielded by Any Common Interest Privilege Protection.

34. Certain of the Log Entries also purport to assert a "common interest" privilege protection. The common interest privilege protection is an exception to the general rule that privilege is waived when confidential communications are shared with third parties. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012). The cornerstone of common interest privilege protection is that parties must share a common legal interest or be engaged in communication in furtherance of a joint legal effort. *See id*. Further, the common interest privilege protection does not provide an independent source of privilege—instead it applies only to a communication that is already protected by a privilege. *See id*.

35. When asserting common interest privilege protection, the proponent of the common interest protection has the burden to show: (1) the communicating parties shared a common *legal* interest; (2) the communication was made in the course of and in furtherance of the joint *legal* effort. *Allied Irish Banks*, 252 F.R.D. at 171; *see also Glynn v. EDO Corp.*, No. JFM-07-01660, 2010 WL 3294347, at *7 (D. Md. Aug. 20, 2010). The common interest privilege "does not encompass a joint business strategy which happens to include . . . a concern about litigation." *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995).

36. As an initial matter, as discussed *supra*, none of MatlinPatterson's communications with Dynamic Credit are privileged as Dynamic Credit was neither a *de facto* employee nor a "nearly indispensable" party to the provision of MatlinPatterson's counsel's legal advice. Because no underlying attorney-client privilege exists, no common interest privilege protection can exist. *See Fireman's Fund Ins. Co.*, 284 F.R.D. at 139.

37. In addition, there is no indication in the documents or Log Entries that MatlinPatterson and Dynamic Credit shared any interest at all, much less a common legal interest, as Dynamic Credit, acting simply as an advisor to MatlinPatterson, apparently had no separate interest of its own in these matters. *See id.* Dynamic Credit and MatlinPatterson therefore did not even share a joint business strategy, as Dynamic Credit was merely assisting MatlinPatterson in achieving its own business strategy. Thus, no basis exists for Dynamic Credit to withhold documents from Defendants pursuant to MatlinPatterson's common interest privilege claims. *See Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16, 19 (E.D.N.Y. 1996) (rejecting common interest claim between defendant and its financial advisor where their "common enterprise . . . was a business, not a legal, enterprise").

CONCLUSION

38. For the foregoing reasons, the Court should grant the Motion and compel Dynamic Credit to produce all the documents listed on the Log.

[*Signature page to follow*.]

Dated: April 7, 2017

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